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**RECEIVED**

MAR 30 1993

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March 30, 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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Secretary  
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1919 M Street, N.W.  
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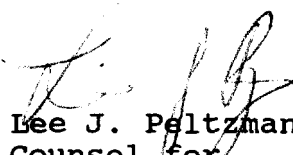
Re: MM Docket No. 93-41

Dear Ms. Searcy:

Transmitted herewith, on behalf of Triad Family Network, Inc., applicant in the above-referenced proceeding, is an original and six (6) copies of its Opposition to Petition for Reconsideration.

Should questions arise with respect to this filing, kindly communicate with the undersigned.

Very truly yours,

  
Lee J. Peltzman  
Counsel for  
TRIAD FAMILY NETWORK, INC.

LJP:bpt  
Enclosure  
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MAR 30 1993

Before the  
Federal Communications Commission  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Application of	)	MM Docket No. 93-41
	)	
TRIAD FAMILY NETWORK, INC.	)	BPED-910227MD
Winston-Salem, North Carolina	)	
Channel 207C3	)	
	)	
POSITIVE ALTERNATIVE RADIO, INC.	)	BPED-911119MC
Asheboro, North Carolina	)	
Channel 207A	)	
	)	
For Construction Permit for a	)	
New Noncommercial Educational	)	
FM Station	)	

To: Chief, Mass Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

Triad Family Network, Inc. ("Triad"), by its attorneys, pursuant to Section 1.106(g) of the Commission's rules, hereby opposes the Petition for Reconsideration filed by Positive Alternative Radio, Inc. ("Radio") on March 15, 1993. In support of its position, Triad submits the following:

By Hearing Designation Order ("HDO"), DA 93-223, released March 9, 1993, the Commission, through its Chief, Audio Services Division rejected a Petition for Leave to Amend filed by Radio proposing a new transmitter site. The Commission specifically considered the question of whether Radio had made a sufficient good cause showing to support acceptance of its engineering amendment and found Radio's showing deficient, citing Erwin O'Conner Broadcasting Co., 22 FCC 2d 140, 143 (Rev. Bd. 1970).

Radio has petitioned for reconsideration of the HDO.

Radio has also filed a Petition for Leave to Amend with the Presiding Officer in this proceeding which contains the same site amendment.

Radio argues in its petition that it had "reasonable assurance" when it filed its Asheboro, North Carolina non-commercial educational application based on an alleged conversation between its principal, Vernon Baker and its proposed site owner, Edward F. Swicegood, II. Radio contends that someone must have "gotten" to Swicegood,<sup>1</sup> resulting in a letter from Swicegood to Baker setting a lease price unacceptable to Radio. It contends that its earlier Petition

only petitioners denied party status in the hearing may file a petition for reconsideration of a hearing designation order. See e.g. Son Broadcasting, Inc., 50 RR 2d 759, 761 n.16 (1981); WIOO, Inc., 42 RR 2d 1356, 1357 (1978); Federal Broadcasting System, Inc., 36 RR 2d 692, 696 (1976); New South Radio, Inc., 36 RR 2d 621, 622 (1976).

Radio recognizes that its petition falls outside the scope of Section 1.106(a)(1) of the rules and therefore argues that the HDO, in effect, inevitably will lead to the dismissal of its application by the Presiding Officer if the Commission's initial action is not reversed.<sup>3</sup>

Radio is wrong. Any alleged adverse consequences of the designation order do not require or even permit the Commission to ignore the express language of Section 1.106. Whether or not Radio will be successful in the instant comparative proceeding is unknown at this point. It may be that, in the event the Commission refuses reconsideration in this case, Radio's application will ultimately be denied. That is the risk that all applicants take in FCC comparative license proceedings. In every case at least one of the parties will not receive a grant. Moreover, in every hearing designation order decisions are made which impact favorably or adversely on each of the applicants. However, the fact that the HDO may theoretically reduce Radio's chances of prevailing in this case does not mean that Radio has been rendered a non-party.

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<sup>3</sup>See Petition for Reconsideration at pp. 2, 9.

As long as Radio's status as a party is not adversely affected, it has no right to seek reconsideration of the HDO. If Radio felt strongly that the matter needed review, then it should have sought certification of the matter by the Presiding Officer to the Commission. See Section 1.115(e)(3) of the Commission's rules. Radio chose not to do so in this case.

Not only is Radio's Petition for Reconsideration objectionable on procedural grounds, but Radio has failed to show that the Commission was wrong in refusing to accept Radio's earlier filed Petition for Leave to Amend. Plain and simple, Radio has failed to satisfy the Erwin O'Conner Broadcasting "good cause" requirements.

In the first place, it is doubtful that Radio even had reasonable assurance of its initially proposed site. While an applicant need not have a binding agreement or absolute assurance, a mere possibility, assumption or hope that the site will be available will not suffice. See 62 Broadcasting, Inc., 4 FCC Rcd. 1768, 1773 (Rev. Bd. 1989); Shoblom Broadcasting, Inc., 93 FCC 2d 1027 and 95 FCC 2d 444 (Rev. Bd. 1985), recon. denied, FCC 84-119 (1984), aff'd per curiam sub nom. Royce International Broadcasting Co. v. FCC, Case No. 84-1168 (D.C. Cir. April 20, 1985). There at least must be a meeting of the minds resulting in some firm understanding as to the site's availability. Genesee Communications, Inc., 3 FCC Rcd. 3595 (Rev. Bd. 1988); Progressive Communications, 61

RR 2d 560 (Rev. Bd. 1986).

There was no such meeting of the minds here. While Radio maintains that "details were generally agreed to," <sup>4</sup> that is fundamentally untrue. The November 16, 1992 letter from Vernon Baker to Edward F. Swicegood II does not discuss

reasonable assurance at the time that it filed its application, it had no right to file a curative amendment. See 62 Broadcasting, Inc., supra, 62 RR 2d at 1835 n.4.

In addition, even assuming arguendo, that Radio had sufficient assurance, its failure to discuss lease terms with respect to price and duration of a lease only made its future problems inevitable. Thus, it did not show sufficient good cause to amend. If Radio was not aware of the cost of its site at the time that it filed its application, it was only because it failed to seriously inquire. If Radio failed to discuss the cost of its proposed site prior to filing, or, for that matter, at any time during the subsequent year, it could scarcely claim unfair surprise when it learned that Mr. Swicegood desired to be paid more than Radio was willing to spend. Radio made a voluntary business judgement that it would not meet Mr. Swicegood's request. It is clear from Radio's own recitation of the facts that Mr. Swicegood did not increase the cost of a proposed lease. Rather, since there never had been any discussion as to price and duration, Mr. Swicegood had every right to express his desires to Radio as to what would be a reasonable amount and term. Radio was not legally bound to accept that proposal. Neither, however, could it reasonably claim that its decision not to accept was an involuntary one.<sup>5</sup>

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<sup>5</sup>While Radio claims that Mr. Swicegood's terms were unreasonable, Radio's sole support for that assertion is the  
(continued...)

In addition, obviously, given the fact that Radio never discussed terms with Mr. Swicegood at the time that it certified to the Commission its assurance of site availability, it was abundantly foreseeable that Mr. Swicegood in the future might request a higher lease fee than Radio was willing to spend. Radio also is in violation of Section 1.65 of the rules because of its failure to advise the Commission for over thirty (30) days of its site loss. This reportable event occurred at the very time that the Commission was preparing a hearing designation order, making the failure all the more important. Additionally, the very need of the Commission and the other party to this proceeding to have to consider Radio's new engineering once more is a disruption and a waste of public and private resources.

Nor do the cases cited by Radio help its position. In Alegria I, Inc., 4 FCC Rcd. 587 (1988), the petitioner had signed an agreement with the site owner, the terms of which were being disputed. The Commission reasonably held that the applicant was not required to go to court to seek to enforce its agreement, but would be allowed to amend to a new site. That obviously is not the case here since there was no

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<sup>5</sup>(...continued)  
opinion of Radio principal, Vernon Baker, hardly an unbiased analyst. Moreover, given the fact that Radio, by its own admission never discussed a specific price with Mr. Swicegood at any time, it has no basis now for second-guessing Mr. Swicegood's opinion of what his land is worth. Radio has described Mr. Swicegood's site as "an optimum site." Radio Petition for Reconsideration at p. 2.



agreement, nor, for that matter, any firm understanding between Radio and site owner, Edward Swicegood. In both Genesee Communications, Inc., 3 FCC Rcd. 3595 (Rev. Bd. 1985) and 62 Broadcasting, Inc., 4 FCC Rcd. 1768, the applicants were ruled not to have reasonable assurance and either were dismissed or had issues added against their application. Finally, in National Innovative Programming Network, Inc., 2 FCC Rcd. 5641, 5643 (1987), principals or agents of the applicant had held three separate conversations with the site owner and each time had received a favorable response. The applicant even submitted a written statement to the Commission from its site owner supporting its position. That clearly has not happened here. As shown above, Radio has not shown that there was the required meeting of the minds between itself and Mr. Swicegood regarding Radio's future use of Mr. Swicegood's site.

Moreover, Radio's amendment is unacceptable on technical grounds as well. As the Engineering Statement of York David Anthony describes, Radio's site has been plotted incorrectly on its site map.<sup>6</sup> Because its site coordinates are incorrect, all of the calculations in its amendment derived from that data, including site elevation and height above average

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<sup>6</sup>Mr. Anthony's Engineering Statement was submitted in support of Triad's Opposition to Petition for Leave to Amend. However, it is equally applicable to this Opposition to Radio's Petition for Reconsideration. It should be noted that Radio is identified by shorthand as "Positive" in Mr. Anthony's Engineering Statement.

terrain, are also wrong. Radio's amendment also fails to include information required by Sections 73.316(c) and 73.316(g) of the Commission's rules. Given these technical flaws, Radio's amendment could not be processed and merited rejection on this ground as well.

In view of the above, Radio's Petition for Reconsideration must be dismissed or denied.

Respectfully submitted,

**TRIAD FAMILY NETWORK, INC.**

By: 

\_\_\_\_\_  
B. Jay Baraff  
Lee J. Peltzman  
Its Attorneys

**BARAFF, KOERNER, OLENDER  
& HOCHBERG, P.C.  
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Washington, D.C. 20015**

**March 30, 1993**

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# ENGINEERING STATEMENT

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At the request, and on behalf of TRIAD FAMILY NETWORK, INC ("Triad") I have been asked to present an engineering statement supporting the attached Opposition to Petition to Leave to Amend. My qualifications as an electrical engineer are a matter of record with the Commission. In support whereof I present the following:

1. Positive Alternative Radio ("Positive") is the applicant for a NEW NCE-FM station at Asheboro, NC. (BPED-911119MC). Positive's application is mutually exclusive with Triad's application for a NEW NCE-FM station at Winston-Salem, NC (BPED-910227MD). On February 9, 1993, Positive filed an engineering amendment to specify a new transmitter site. Positive's new proposed site is the #2 tower of standard broadcast station WZOO Asheboro, NC. Pertinent technical information for WZOO appears as Exhibit 1.

2. The following basic and derived information is supplied by Positive in FCC Form 340, section V-B. This data is critical for the foregoing analysis.

TABLE 1

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Parameter (Form 340 #)	Positive's Amendment	WZOO FCC Data
Site Coordinates [2(a)]	35-45-50 N, 79-50-04 W	35-45-50 N, 79-50-04 W
Site Elevation [7(a)(1)]	195 meters	213 meters
Tower Height [7(a)(2)]	106 meters	106 meters
Total Height [7(a)(3)]	301 meters	319 meters
FM height AGL [7(b)(1)]	99 meters	(no present FM)
FM Height AMSL [7(b)(2)]	294 meters	"
HAAT [7(b)(3)]	91 meters	"

3. Analysis of Positive's amendment shows its analysis of basic quantities (site coordinates and elevation) and calculated derived quantities ( HAAT, allocation studies) are incorrect (See para 4 to 9). On March 3, 1993 Positive's amended application was copied from the Commission's public inspection file. This is Figure 1 in Positive's amendment and appears as Exhibit 2 herein.

4. The "Proposed Site" mark of Positive was transferred to a new Randleman, North Carolina USGS 7.5 minute map (which is provided in the original of this engineering statement.) This map (Exhibit 3) is identical to Positive's Figure 1. A new map ensures accurate determination of site location and elevation. Common office copiers (as used in Positive's amendment) introduce distortion that can affect ratiometric coordinate calculations. However, these errors are negligible for site location relative to nearby features.

5. On analysis, Positive's site mark on its site map reveals site coordinates of 35-45-50 N and 79-50-01 W. This does not square against WZOO's FCC coordinates of 35-45-50 N and 79-50-04 W. Positive's error is approximately 75 meters (245 feet) due east. Positive's 3 arc-second error is considerably greater than the Commission's permitted tolerance of 1 arc-second plus or minus.

6. On February 22, 1993, this office travelled to Asheboro, North Carolina to examine the WZOO site. Observations were confined to SR 3137 (Lazy Pine Road). The purpose was to determine if WZOO's #2 tower was in fact located at 35-45-50 N and 79-45-04 W. A Trimble TransPak GPS (global positioning system), and triangulation from known landmarks revealed that WZOO's #2 tower location is correctly specified. The Randolph County, NC Tax Assessor's map #7753, and various land deeds were searched to obtain fixed landmarks of legal quality. Map #7753 is presented as Exhibit 4.

7. Analysis of our raw data indeed show that WZOO's site coordinates for tower #2 are correct. Moreover, the raw data show that WZOO's site elevation is also correct.

8. Positive states in its engineering exhibit it claims the published elevation for WZOO is 700 feet AMSL (or 213 meters). It claims that the actual elevation for WZOO is 638 feet AMSL (or 194 meters). Its figures are not correct. When WZOO's #2 tower is plotted correctly the site elevation is 650 feet (or 198 meters).

9. Both Positive's site coordinates and elevation data are incorrect. Therefore, Positive's derived data ( including HAAT ) contained on section V-B page 2 of its amendment is incorrect.

10. Positive's amendment has further engineering difficulties. Whenever an FM directional antenna (FM-DA) is specified by an applicant, rule 73.316(c) is invoked. The 73.316 data offered by Positive is inadequate. A stock Cetec FM-DA is specified by Positive. No description of the antenna (other than a model number) is presented; therefore, the "full description" of the antenna design required in 73.316(c)(1) is not met. Furthermore, the required showing pursuant to 73.316(c)(4) through 73.316(c)(7) has simply been omitted.

11. Also, rule 73.316(g) is not substantially addressed by Positive. Positive specifies an isocoupler will be provided to avoid shorting the WZOO #2 tower to ground. Also, Positive agrees to make certain measurements before and after construction. Positive, however, does not state other data required establishing the FM proposal's feasibility.

12. For example, on Form 340, Positive's FM antenna radiation center is reckoned to be 99 meters AGL. The specified antenna is at least 10.1 meters long. WZOO's top guy rope anchors are 97.5 meters AGL. A 10.1 meter long antenna centered at 99 meters AGL is close to the anchors at 97.5 meters AGL. One FM antenna bay is coincident with the clevis and pin arrangement anchoring WZOO's guy ropes. Conductive steel rope passing into the FM antenna active volume requires detailed engineering study for electrical and mechanical reasons.

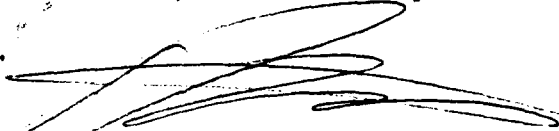
13. Also, installation of an FM antenna on WZOO's #2 tower may sufficiently alter WZOO's antenna system so that a complete proof of performance on the AM antenna is required. For example, constructing a building to house Positive's transmitter (or plowing up the AM ground system to install

the FM transmission line) may greatly disturb WZOO's facility. Moreover, when a station is "grandfathered" under the old sampling system rules the FCC has often required a new Proof and installation of an approved sampling system under rule 73.68.

14. Positive has not adequately assessed the technical effects or expense of its proposal as regards WZOO's AM directional. This includes overall performance (e.g. allocation effects), effects of FM equipment installation above the tower base, and particularly the adequacy of WZOO's present sampling system. The intent of rule 73.316(g) is to require a complete demonstration of one's due diligence when an AM-DA is specified as an FM site. Positive's expression of an isocoupler installation and taking measurements specified by the Commission is not, in our opinion, adequate. In particular, installation of a new sampling system (if required) and conducting any sort of antenna proof is an expensive and inconvenient undertaking at best.

15. In conclusion, specification of AM station WZOO's tower #2 is fundamentally flawed. The site coordinates and elevation as marked on the 7.5 minute map offered by Positive are incorrect. This basic information must be correct and internally consistent for the Commission's examination. Also, material required by rule 73.316(c) and 73.316(g) is inadequate or completely absent as presented by Positive. There are other serious questions as to the feasibility of its proposal.

I certify under penalty of perjury that the statements made herein are true to the best of my knowledge and belief, and that I represent the applicant in the capacity indicated.

  
/s/ York David Anthony  
Engineering Consultant  
Triad Family Network, Inc.

This the 25th day March, 1993.

EXHIBIT 1  
 TRIAD FAMILY NETWORK, INC.  
 NEW FM, WINSTON-SALEM, NC

FCC DATABASE RECORD  
 WZOO ASHEBORO, NC

City of License	St Call	Auth Hr	Cls	Freq	Ant	Power	RMS	Latitude
Licensee name	Rec date	IC				kW	mV/m	Longitude

```

=====
ASHEBORO          NC WZOO LIC  D II   710 DA-D      1 333.1  35-45-50
FAITH ENTERPRISES INC      111986 B                      79-50-04
Format: REL; Network: AP; Air date: 05/03/71; 77.35 Mi; 41.21 Deg
  
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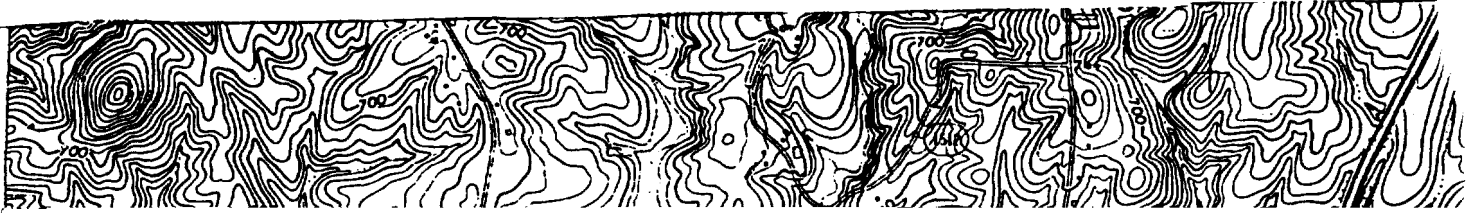
----- Day Antenna; Q= 11.213; El=198.241 -----
Twr  Field Phasing Spacing Orient. A-Ht  B-Ht  C-Ht  D-Ht Ref TL/ G-Ht.
#    Ratio (Deg.) (Deg.) (D-tru) (Deg) (Deg) (Deg) (Deg) SW Sec (Deg.)
1      1    -134                40          0      89.1
2     1.77     90     40          0      89.1
3      1    134    180     40          0      89.1
  
```

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--- Augmentation Data ---
Aug  Azimuth  Span  Radiation  A-factor
# (Deg-Tru) (Deg.) (mV/M @ KM)
1      5.0    24.0    32.2    896.7
2     22.0    34.0    56.3    843.7
3     40.0    34.0    74.0    699.8
4     57.0    34.0    59.6   1006.2
5     75.0    24.0    32.2    896.7
6     87.0    24.0    46.7    897.1
7    100.0    18.0    57.9    852.2
8    109.0    18.0    48.3    839.4
9    118.5    19.0    32.2    897.5
10   316.0    11.0    51.5   1401.5
11   321.5    11.0    32.2    897.5
12   331.0    18.0    48.3    839.4
13   340.0    18.0    56.3    668.2
14   340.0    10.0    57.0     72.5
15   353.0    24.0    46.7    897.0
  
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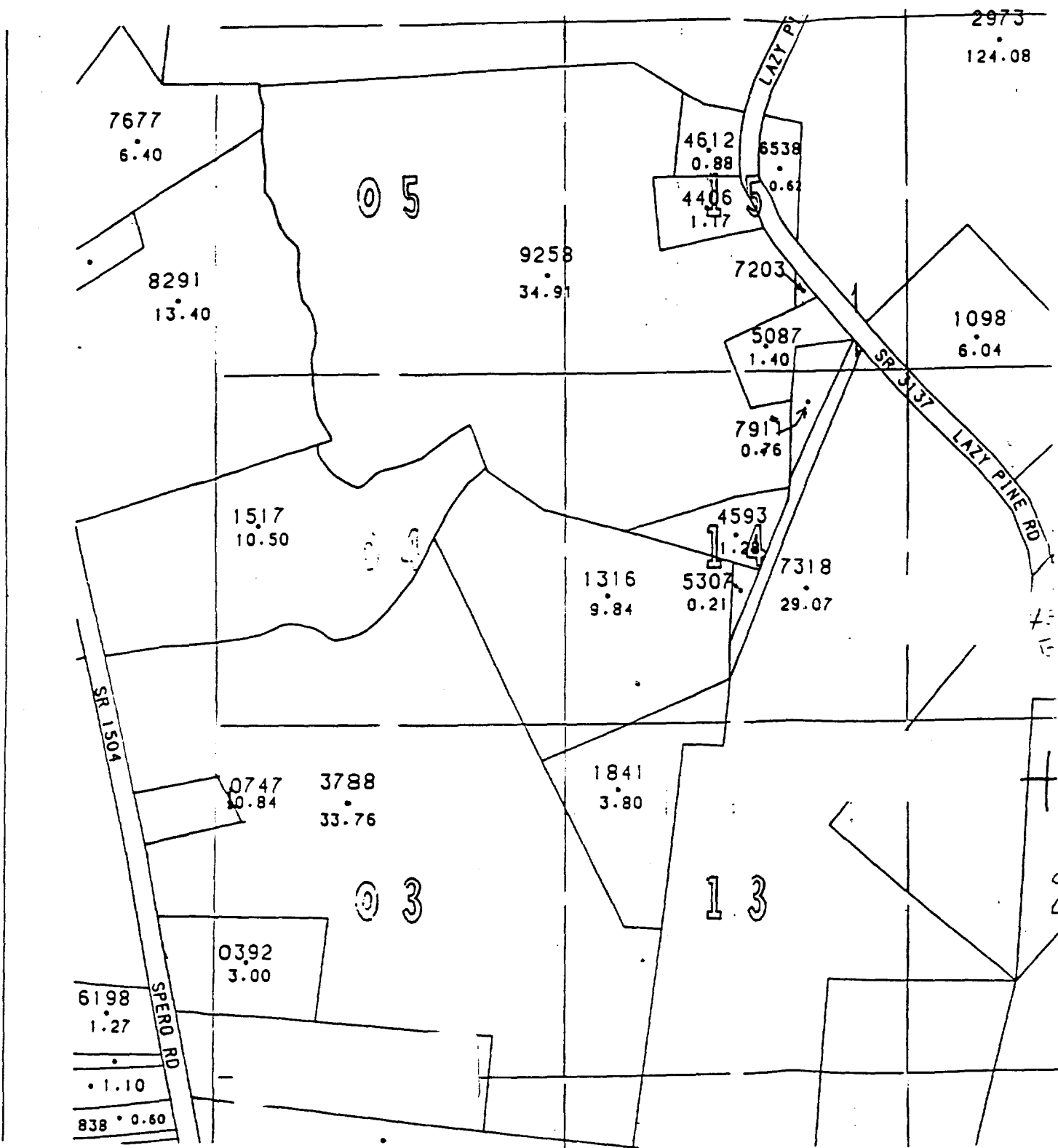
47'30"

3961





MAP 1155 06/26/92

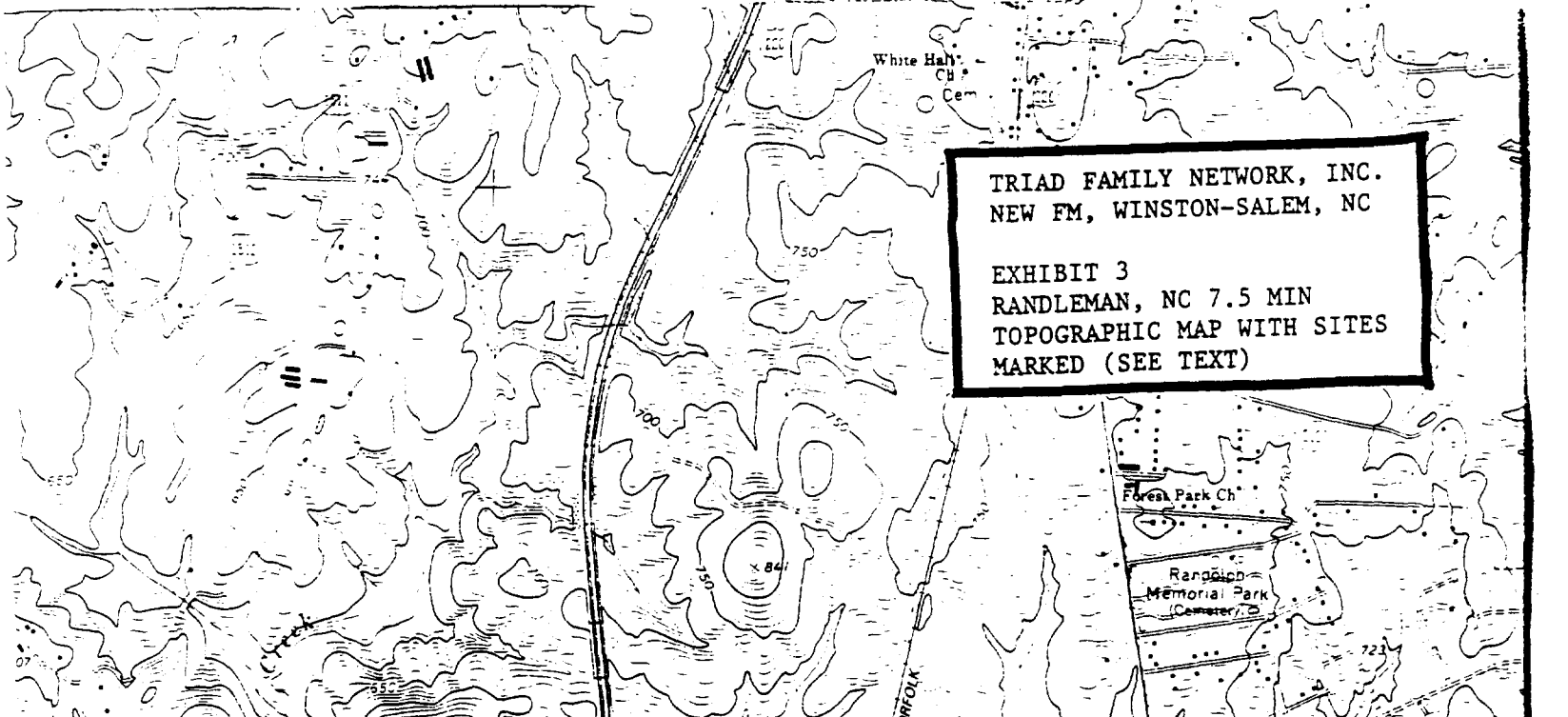


LAZY PL

2973  
124.08

COUNTY, NORTH

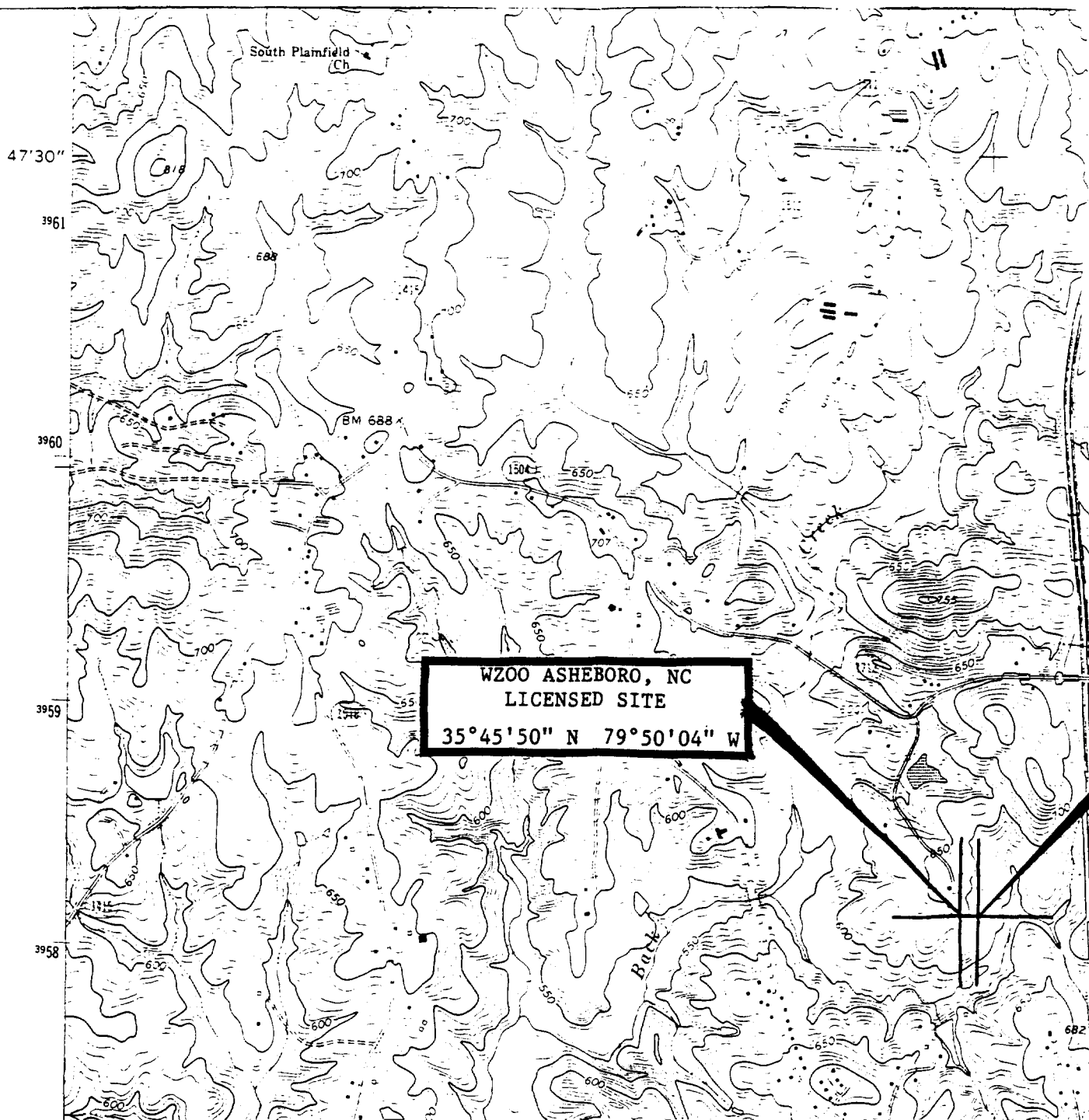
9.1



TRIAD FAMILY NETWORK, INC.  
NEW FM, WINSTON-SALEM, NC

The map is a topographic representation of a 7.5-minute section in Randleman, North Carolina. It features contour lines indicating elevation, with labels for 700, 750, and 800 feet. A prominent road, labeled '700' and '750', runs vertically through the center-left. To the right of the road, there are several small, irregular shapes representing fields or wooded areas. In the upper right, a small area is labeled 'White Hall Ch. Cem'. In the lower right, a larger area is labeled 'Randleman Memorial Park (Cemetery)'. The map is framed by a double line on the left and a single line on the right.

EXHIBIT 3  
RANDLEMAN, NC 7.5 MIN  
TOPOGRAPHIC MAP WITH SITES  
MARKED (SEE TEXT)



CERTIFICATE OF SERVICE

I, Barbara P. Taylor, a secretary in the law offices of Baraff, Koerner, Olender & Hochberg, P.C., do hereby certify that a true and correct copy of the foregoing "Opposition to Petition for Reconsideration" on behalf of Triad Family Network, Inc., has been sent by prepaid United States mail,